In The

Supreme Court of the United States

October Term, 1994

STATE OF IDAHO; PHIL BATT, GOVERNOR; PETE CENARRUSA, SECRETARY OF STATE; ALAN G. LANCE, ATTORNEY GENERAL; J.D. WILLIAMS, CONTROLLER; ANNE FOX, SUPERINTENDENT OF PUBLIC INSTRUCTION; KEITH HIGGINSON, DIRECTOR, DEPT. OF WATER RESOURCES; each individually and in his official capacity; IDAHO STATE BOARD OF LAND COMMISSIONERS; and IDAHO STATE DEPARTMENT OF WATER RESOURCES,

Petitioners,

v.

COEUR D'ALENE TRIBE, in its own right and as the beneficially interested party subject to the trusteeship of the UNITED STATES OF AMERICA; ERNEST L. STENSGAR, LAWRENCE ARIPA, MARGARET JOSÉ, DOMNICK CURLEY, AL GARRICK, NORMA PEONE and HENRY SIJOHN, individually, in their official capacity and on behalf of all enrolled members of COEUR D'ALENE TRIBE,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Eleventh Amendment bars federal courts from hearing quiet title actions brought by Indian tribes against a State to adjudicate title to, and gain possession of, waters and submerged lands held by the State under the equal footing doctrine of the United States Constitution. The issue presented by this case is whether a federal court may nonetheless hear an action against state officers for injunctive and declaratory relief when such relief requires adjudication of the State's title and will deprive the State of all practical benefits of ownership of the disputed waters and submerged lands.

2. The President, absent an express delegation of Congress' exclusive authority over public lands, cannot convey title of uplands to Indian tribes. *Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942). The issue presented in this case is whether the President, acting without express congressional authority, can nonetheless convey title of the beds and banks of navigable waters to an Indian tribe, thereby defeating a State's entitlement to such lands under the equal footing doctrine of the United States Constitution.

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The Attorney General of the State of Idaho, on behalf of the State of Idaho and the other named defendants, petitions for a writ of certiorari to review the judgment of

the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. at 1) is reported at 42 F.3d 1244. The opinion of the district court (App. at 29) is reported at 798 F. Supp. 1443.

JURISDICTION

The court of appeals entered its judgment on December 9, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment of the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Property Clause of the United States Constitution, Art. IV, § 3, cl. 2, provides in relevant part:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . .

STATEMENT OF THE CASE

This action centers on a dispute over the ownership of the beds and banks of Lake Coeur d'Alene and its associated waterways, the Coeur d'Alene River, the Spokane River and the St. Joe River. These navigable waterways are widely known for their scenic beauty. Located in the forests of northern Idaho, the waterways are adjacent to many private homes and businesses and are heavily used by the general public for recreation, as well as for commercial transportation of raw lumber.

At one time, the waterways at issue were located within the area "withdrawn from sale and set apart as a reservation for the Coeur d'Alene Indians" by executive order on November 8, 1873. The Reservation boundaries, however, were later modified by an agreement ratified by Congress, wherein the Tribe ceded its interests in the majority of the Reservation, leaving only the lower reach of the St. Joe River and the southern third of Lake Coeur d'Alene within the boundaries of the Reservation. Act of March 3, 1891, 26 Stat. 989, 1027.

Congress opened the Coeur d'Alene Reservation to non-Indian settlement in 1906. Act of June 21, 1906, 34 Stat. 325, 335. As a result of this action, the Reservation is now largely in private ownership. The Coeur d'Alene Tribe owns less than a quarter of the lands within the reservation. The Tribe's holdings are primarily located on agricultural lands miles distant from Lake Coeur d'Alene.

Pursuant to the equal footing doctrine, Idaho assumed sovereign title to the beds and banks of all navigable waters within its borders upon its admission into the Union on July 3, 1890. Idaho has acted to protect its sovereign interests in Lake Coeur d'Alene and its associated river systems. In 1927, the State Legislature, in an unusually farsighted action, enacted legislation dedicating and preserving the waters and submerged lands of Lake Coeur d'Alene for the purposes of "scenic beauty, health, recreation, transportation and commercial purposes." Idaho Code §§ 67-4304, 67-4305 (1989). The management of Lake Coeur d'Alene and other navigable waterways is vested in the State Board of Land Commissioners, a constitutional body consisting of the governor, the attorney general, the secretary of state, the state controller, and the superintendent of public instruction. Idaho Code §§ 58-101, 58-104(9) (1994).[1]

The Coeur d'Alene Tribe brought the instant action against the State of Idaho, the State Board of Land Commissioners and its members, the Department of Water Resources, and the director of the Department of Water

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[1] Idaho court decisions have often reaffirmed the State's title to the Lake and its associated rivers. In 1921, the Idaho Supreme Court recognized that the State has title to the beds of Lake Coeur d'Alene below the natural high water mark. *Burrus v. Edward Rutledge Timber Co.*, 202 P. 1067 (Idaho 1921). More recently, the court, in a case in which the State was a party, confirmed that the State holds title to the beds of Lake Coeur d'Alene below the natural high water mark. *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1088 (Idaho 1983). *See also Shephard v. Coeur d'Alene Lumber Co.*, 101 P. 591 (Idaho 1909) (Lake Coeur d'Alene is a public highway and cannot be converted to private use).

Resources. The Tribe alleged title and ownership over the beds, banks and waters of all navigable waterways within the Reservation boundaries as described in the 1873 executive order. The Tribe asked the court to quiet the Tribe's asserted title to the beds, banks and waters at issue, and to declare that the Tribe was entitled to the exclusive use and occupancy of the beds, banks and waters. It asked the court to declare invalid all Idaho statutes, ordinances and regulations purporting to regulate, authorize use, or affect in any way the beds, banks and waters at issue. It also asked the court to permanently enjoin the state officers from regulating, permitting, or taking any action in violation of the Tribe's asserted right of exclusive use and occupancy. The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331 (general federal question), 1343(4) (civil rights actions) and 1362 (actions brought by Indian tribes).

The State moved to dismiss the Tribe's action under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The State asserted that the Eleventh Amendment barred the court from adjudicating the State's title to the beds and banks at issue. Following briefing and argument, the district court granted the motion and dismissed the case, both on the basis of the Eleventh Amendment and on the basis that the Tribe's complaint failed to state a claim to the beds, banks and waters at issue. 798 F. Supp. at 1452, App. at 49. The Tribe appealed.

The Ninth Circuit Court of Appeals upheld the dismissal of the Tribe's claims against the State and the state agencies, but held that the Eleventh Amendment did not bar the claims for injunctive and declaratory relief against the state officers. The court began by recognizing that the

First Circuit, the Fifth Circuit, the Seventh Circuit, and even another panel of the Ninth Circuit had concluded that all actions that necessarily involve the adjudication of a State's interest in real property are barred by the Eleventh Amendment, whether or not the State is named as a defendant. 42 F.3d at 1252-53, App. at 16-17. The court interpreted some of the cases so as to distinguish them, but ultimately was faced with a decision from the Fifth Circuit squarely holding that the Eleventh Amendment bars injunctive relief requiring state officers to give up possession of property claimed by the State. The Fifth Circuit reasoned that because such an action cannot proceed without adjudicating the State's interest in the disputed property, it is equivalent to an action against the State itself. *John G. and Marie Stella Kenedy Memorial Foundation v. Mauro*, 21 F.3d 667, 672 (5th Cir. 1994).

The Ninth Circuit, however, rejected the reasoning of the Fifth Circuit. Instead, it concluded that under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), federal courts have the authority to require state officers to conform their actions to federal law. 42 F.3d at 1254-55, App. at 19-23. Therefore, it remanded the case back to the district court with directions to determine whether federal law vests the Tribe with ownership of the property and, if so, to require state officers to act in "accordance with what the district court finds to be the Tribe's right to the property." *Id.* at 1255, App. at 22. The Ninth Circuit did not explain, however, how this was to be accomplished without adjudicating the State's claims to the property.

In addition, the appellate court held that the President may defeat a state's entitlement to the beds and

banks of navigable waterways by transferring such lands to Indian tribes without explicit congressional authorization. 42 F.3d at 1256-57, App. at 25-27. It determined that an executive order purporting to transfer beds and banks to an Indian tribe should be analyzed under the test for conveyances of beds and banks, and not under the stricter test established by this Court for "reservations" of federal lands in *Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987). 42 F.3d at 1256, App. at 25-26. The court based its decision on its belief that Indian reservations are "legally different" from other types of federal reservations and actions setting them apart should be treated as conveyances to the affected tribe. *Id.*

REASONS FOR GRANTING THE WRIT

1. The Appellate Court's Holding Allowing Actions Against State Officers For Possession Of Sovereign Submerged Lands Claimed By The State Conflicts With Prior Holdings Of This Court And Other Circuit Courts Of Appeal.

There is no issue more fundamental to the continued health of our federal system than that of maintaining the proper balance between state and federal authorities. "[T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government." *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869). The state sovereign immunity embodied in the Eleventh Amendment has a "vital role" in our federal system. *Pennhurst State*

School & Hospital v. Halderman, 465 U.S. 89, 99 (1984). Just as the Tenth Amendment prohibits Congress from directly ordering state action, *New York v. United States*, 112 S. Ct. 2408, 2423 (1992), the Eleventh Amendment prohibits federal courts from ordering relief that operates directly against the States. The only exception is where consent to such suits is implicit in the Constitution itself. A primary example is the consent given by the States to actions brought by the federal government. *Blatchford v. Native Village of Noatak*, 111 S. Ct. 2578, 2582 (1991). This consent acknowledges that the federal government is the proper party to seek adjudication of a State's sovereign interests when necessary to vindicate federal policies.

Nowhere is this more true than in the present case, which involves a fundamental constitutional guarantee – the State's title and control over sovereign submerged lands. Control of submerged lands is such a fundamental aspect of sovereignty that it is guaranteed to the States as part of the compact between the States and the federal government. *Shively v. Bowlby*, 152 U.S. 1, 27, 34 (1894). Any questions regarding that compact are most appropriately decided between the sovereigns. If third parties are allowed to collaterally attack state title to sovereign lands, then the State's ability to manage those lands for the benefit of its people will be put in jeopardy. Although the Ninth Circuit's decision purports to leave open the question of the State's title to submerged lands, allowing an action against state officers for possession of such lands will, for all practical purposes, deprive the State of its ownership if an injunction is issued. Such a result is at odds with the very purpose of the Eleventh Amendment

and raises a broadly significant constitutional question that should be reviewed by the Supreme Court.

The need for review is heightened by the fact that the Ninth Circuit's decision creates a conflict among the Circuit Courts of Appeal on a fundamental constitutional question. "[A] motion by a State or its agents to dismiss on Eleventh Amendment grounds involves a claim to a fundamental constitutional protection . . . . " *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 113 S. Ct. 684, 688 (1993). Accordingly, the Court has often granted certiorari to resolve conflicts among the Circuits over the scope of immunity embodied in the Eleventh Amendment. *E.g., Green v. Mansour*, 474 U.S. 64, 67 (1985); *Edelman v. Jordan*, 415 U.S. 651, 658 (1974).

The conflict created by the Ninth Circuit's decision arises from a line of cases originating with this Court's split decision in *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982). In *Treasure Salvors*, a salvage company discovered the wreck of the Spanish galleon *Atocha* off the Florida coast. The wreck contained valuable artifacts. The State claimed the artifacts under a state law asserting ownership of all shipwrecks on submerged lands owned by the State. *Id.* at 673. Pursuant to that law, the State and the salvage company entered into a contract whereby the company received 75% of the recovered salvage and the State received 25%. *Id.*

In an unrelated action, a federal court determined that the State did not own the submerged lands on which the shipwreck was found. *Id.* at 675. After that decision was finalized, the salvage company brought an *in rem* admiralty action to quiet its title to the artifacts recovered

from the *Atocha*. *Id*. At that time, the items were in the custody of state officers. Since the items were outside the jurisdiction of the district court, the plaintiffs obtained a warrant of arrest requiring the state officers to surrender possession of the artifacts and deliver them into the possession of a custodian appointed by the court. *Id*. at 691.

Following an appeal upholding the warrant, this Court granted certiorari to determine whether the Eleventh Amendment barred the warrant securing possession of the artifacts from the state officers. Four members of the Court concluded that the order should be upheld because the state officers holding the property were acting without legitimate authority, since the State did "not have even a colorable claim to the artifacts." *Id*. at 694. The lack of a colorable claim was based on the fact that no state statute asserted ownership of artifacts on submerged lands outside the State's jurisdiction. *Id*. at 695-96. Likewise, the contract between the State and the salvage company did not purport to provide the State title to artifacts on non-state lands. *Id*. at 694-95. Therefore, the plurality concluded, "since the state officials do not have a colorable claim to possession of the artifacts, they may not invoke the Eleventh Amendment to block execution of the warrant of arrest." *Id*. at 697. At the same time, the plurality held that the lower court's adjudication of the State's claim to the artifacts should be reversed, since such adjudication was barred by the Eleventh Amendment. *Id*. at 699-700.

Another four members of the Court, in a dissent authored by Justice White, believed that the state officers did have a colorable basis under the contract for retaining possession of the artifacts. *Id*. at 713. Therefore, they

concluded, the court could not order the state officers to surrender possession of the artifacts without reaching the merits of the State's claims. *Id*. at 716. Any inquiry into the validity of the officer's possession would, in the dissent's view, be "tantamount to deciding the question of title itself," a result barred by the Eleventh Amendment. *Id*. at 717.

Ultimately, the warrant to arrest was upheld, since Justice Brennan, in a separate opinion, concurred in the judgment allowing injunctive relief against the state officers. Justice Brennan believed that the Eleventh Amendment did not apply to the situation at all, since the suit was between a State and citizens of that same State, and therefore outside the literal language of the Eleventh Amendment. *Id*. at 700-702.

Most courts reviewing similar actions subsequent to *Treasure Salvors* have held that federal courts cannot proceed with actions (either *in rem* or against state officers) that require adjudication of state claims to property so long as the State has a "colorable" claim to the property. *Fitzgerald v. Unidentified Wrecked and Abandoned Vessel*, 866 F.2d 16 (1st Cir. 1989) (*in rem* admiralty action clearly directed against Commonwealth of Puerto Rico and therefore barred by Eleventh Amendment); *Zych v. Wrecked Vessel Believed to be the Lady Elgin*, 960 F.2d 665 (7th Cir. 1992) (*in rem* admiralty action barred necessity of adjudicating colorable state claim); *Harrison v. Hickel*, 6 F.3d 1347, 1348 (9th Cir. 1993) (affirming dismissal of quiet title claim to native allotment against state officers because the requested relief "directly affects the interests of the State of Alaska"); *Toledo, Peoria & Western R.R. Co. v. Illinois Dep't of Transportation*, 744 F.2d 1296, 1299 (7th

Cir. 1984) (barring action against state officers to gain possession of disputed lands since action is similar to retroactive relief and therefore directly impacts the State).

In the instant case, however, the Ninth Circuit viewed the prior decisions as dicta, interpreted them in such a way as to distinguish them, or simply rejected them. 42 F.3d at 1252-53, App. at 17-19. Despite the overwhelming precedents to the contrary, the Ninth Circuit determined that the State's possession of colorable title to the property, and the necessity of adjudicating that title, were not a barrier to adjudication in light of this Court's decision in *Ex parte Young* allowing prospective relief against state officers when necessary to enjoin ongoing violations of federal law. *Id.* at 1254-55, App. at 19-23.

The Ninth Circuit recognized that it was creating a conflict with other circuits when it reviewed, and expressly rejected, the Fifth Circuit's decision in *John G. & Marie Stella Kenedy Memorial Foundation v. Mauro*, 21 F.3d 667 (5th Cir. 1994). In *Mauro*, the John G. & Marie Stella Kenedy Memorial Foundation (the Foundation) brought an action against the Commissioner of the Texas General Land Office, seeking an adjudication of the boundary between the Foundation's property and state-owned submerged lands. The Foundation claimed that the disputed land was not submerged land and therefore belonged to the Foundation. *Id.* at 671.

The Foundation requested that the federal court determine and declare that the Foundation was the owner of the disputed land, and that Mauro be enjoined from exercising dominion over the disputed land. *Id.* at 671. The court held that to "provide the Foundation with the

relief it requests would necessitate a determination by the district court that the State does not have title to the disputed property . . . . " *Id.* at 671-72. The court went on to state that the critical factor was that the State possessed a colorable claim to the disputed property:

> The instant case is distinguishable from *Treasure Salvors* in that the defendant officials in *Treasure Salvors* had no colorable claim under which they were authorized by the State to hold these artifacts. On the other hand, the State has "owned" the property at issue in the instant case for the past century, and title was effectively adjudicated in the State in *Humble Oil*. Moreover, the *Treasure Salvors* plurality determined that the warrant of arrest issued by the district court was permissible prospective relief because it sought only possession of the property from the defendant officials and was not an *in personam* action to recover damages against the State. The relief the Foundation requests in the instant case, even if it is "possession" as against Mauro, can only be granted if the district court orders the State to relinquish its interest in the disputed property. Such relief would be the equivalent of recovering damages from the State.

Id. at 673.

Sound reasoning supports the notion that the critical factor in actions against state officers for possession of property is whether the State has a colorable claim to the disputed property. In such cases it is impossible to order the state officers to give up possession of the property without first adjudicating the validity of the State's claim. Indeed, eight of the justices in *Treasure Salvors* agreed that

the Eleventh Amendment bars actions against state officers that require adjudication of the State's claims to property. The plurality held that the Eleventh Amendment did not bar issuance of the warrant of arrest because such a process "does not require – or permit – a determination of the State's ownership of the artifacts." 458 U.S. at 699. The dissenters believed that any action filed for the purpose of litigating and deciding a State's claim to disputed property "is at the heart of the Eleventh Amendment immunity" regardless of whether the only named defendant is a state officer. *Id.* at 706.

In this case, there is no doubt, and indeed the appellate court did not question, that Idaho has a colorable claim to the beds and banks of Lake Coeur d'Alene. Under the equal footing doctrine, there is a "strong presumption" that each State has title to the beds and banks of all navigable waters within its borders. *Montana v. United States*, 450 U.S. 544, 552 (1981).

The equal footing doctrine is based on English common law principles that ownership of submerged lands is vital to the sovereign's ability to control navigation, fishing, and other public uses of water, and therefore is an essential attribute of sovereignty. *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195 (1987). When the 13 colonies became independent from Britain, they succeeded to the English Crown's title to the beds and banks of navigable waters. Because all subsequently admitted states enter the Union on "equal footing" with the 13 original states, they too hold title to lands under navigable waters within their boundaries. *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 228-29 (1845). Title vests automatically in the State upon admission to the Union without further

action from Congress. *Shively v. Bowlby*, 152 U.S. 1, 27 (1894).

Before statehood, the United States holds submerged lands within territories in trust for future states. *Montana*, 450 U.S. at 551. Even though Congress had authority to dispose of submerged lands in order to carry out "public purposes appropriate to the objects of which the United States hold the territory," *Shively*, 152 U.S. at 48, congressional policy was to "grant away land under navigable waters *only* 'in case of some international duty or public exigency.' " *Utah Div. of State Lands*, 482 U.S. at 197 (quoting *Shively*, 152 U.S. at 50). Because of this overwhelming policy against conveyance, disputes regarding ownership of submerged lands must begin with the strong presumption that pre-statehood actions by Congress did not affect the future state's ownership of submerged lands. *Utah Div. of State Lands*, 482 U.S. at 197-98. This presumption can be defeated only by evidence demonstrating that Congress definitely declared or otherwise made plain its intent to defeat the equal footing entitlement of the future state. *Id.*

Thus, the only way the Tribe can prevail in this action is to rebut the strong presumption of state ownership. Under such circumstances, the appellate court erred by presuming that this case can proceed without adjudicating the validity of the State's equal footing title to the disputed lands. This case more than any other violates the rule adopted by eight of the Justices in *Treasure Salvors*: namely, that if the State has a colorable claim to the disputed property, any process that requires adjudication of that claim is barred by the Eleventh Amendment.

Review of the Ninth Circuit's opinion is further justified because it is an unprecedented expansion of the doctrine developed by this Court in *Ex parte Young*, 209 U.S. 123 (1908). The *Ex parte Young* doctrine is a legal fiction that allows actions against state officers to proceed on the theory that state officers, when attempting to enforce unconstitutional state statutes, are acting without the legitimate authority of the State and therefore the proceeding "does not affect the State in its sovereign or governmental capacity." *Id.* at 159. The named official must have some connection to enforcement of the allegedly unconstitutional statute, "or else it is merely making him a party as a representative of the State, and thereby attempting to make the State a party." *Id.* at 157. Expansion of the doctrine is strongly disfavored. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 114 n.25 (1984) ("the authority-stripping theory of Young is a fiction that has been narrowly construed").[2]

The instant case is fundamentally different from the class of actions allowed by *Ex parte Young*. The main focus of the Tribe's action is to establish the Tribe's alleged title to the disputed beds, banks and waters. The Tribe's request to the district court to enjoin enforcement of state laws regulating the use of the disputed beds, banks and waters is secondary to, and dependent on, the

[2] The need for narrow construction of *Ex parte Young* is consistent with other federalism cases stressing the general principle that federal authority can be exercised against individuals, but not against states, which "possess sovereignty concurrent with that of the Federal Government." *New York v. United States*, 112 S. Ct. 2408, 2421 (1992), *quoting Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).

establishment of the Tribe's title. In other words, before the district court can reach the question of the enforcement of state laws, it must decide the Tribe's title in the disputed property vis-à-vis the State. In this most fundamental portion of the case, the state officers' only role is to appear as the representative of the State, a role this Court expressly prohibited in *Ex parte Young*. 209 U.S. at 157.

Application of *Ex parte Young* is also called into question because of the nature of the disputed property. *Ex parte Young* is a procedural device that allows federal courts to assure the supremacy of federal law by enjoining state officers from enforcing unconstitutional state legislation. *Treasure Salvors*, 458 U.S. at 684-85. In the instant case, however, the State's possession of the property is derived not from state legislation, but from the act of Congress admitting Idaho into the Union on an equal footing with every other state. Idaho Admission Act, 26 Stat. 215, ch. 656, § 1. Thus, the justification for *Ex parte Young*, the need to insure the supremacy of federal law over state law, is not directly implicated here. Moreover, even if such a concern were present, it would be more properly addressed by an action between the United States and the State of Idaho, since the State has surrendered its immunity to such suits. *United States v. Texas*, 143 U.S. 621, 646 (1892). Indeed, the United States recently filed an action against the State in federal district court to determine its claims to the submerged lands at issue in this case. *United States v. Idaho*, No. 94-0328 (D. Idaho) (complaint filed July 21, 1994).[3]

[3] The United States' action seeks to quiet title to the southern third of Lake Coeur d'Alene in the name of the United States

In summary, this case merits the Court's review. The appellate court's decision creates a fundamental conflict between the circuits on a vital Eleventh Amendment issue and greatly expands the legal fiction created in *Ex parte Young*. Allowing state title to sovereign property to be decided on the theory that such relief acts only against state officers is the ultimate elevation of form over function. It cannot be reasonably denied that such injunctive relief denies the State of all benefit of its sovereign property. Such an outcome would be abhorrent to the drafters of the Constitution, who intended for the federal judiciary to refrain from ordering relief that directly impacts a State's sovereign interests.

2. The Appellate Court's Holding That The President May Convey Submerged Lands To Indian Tribes Without Express Congressional Authorization Conflicts With This Court's Prior Holdings.

The equal footing doctrine is a fundamental constitutional guarantee to all States. Its basic principles have not changed since its first application approximately 150 years ago. The Ninth Circuit decision unfortunately ignores those long-established principles, weakens the

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as trustee for the Tribe, as opposed to the Tribe's action, which seeks title to the entire Lake. The Tribe is not without a remedy if it wishes to pursue its claim to the northern two-thirds of Lake Coeur d'Alene. The Tribe may proceed against the State in state court, since Idaho has specifically waived its immunity to quiet title actions brought in state court. Idaho Code § 5-328. *See also Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) (state courts have inherent authority and are presumptively competent to adjudicate claims arising under federal law).

equal footing doctrine, and threatens Idaho's sovereignty over Lake Coeur d'Alene. The decision changes 1) the established constitutional standard for determining whether a State's title to submerged lands has been denied, 2) reverses the presumption of state title in the absence of express congressional action, and 3) demotes sovereign submerged lands to the status of public domain. The lower court's decision undermining Idaho's sovereignty over Lake Coeur d'Alene is likely to affect many interests beyond those presented here and clearly conflicts with prior decisions of this Court. The decision invites conflict and creates problems for all states in which executive order reservations have been created. This is a significant constitutional question that warrants Supreme Court review.

Between 1846, when the United States acquired the area now known as Idaho from Great Britain, and 1890, when Idaho was admitted to the Union, Congress held the beds and banks of navigable waters in trust for the future State. *Montana v. United States*, 450 U.S. 544, 551 (1981). Congressional policy was to retain the submerged lands for the use of the future State except in the "most unusual circumstances." *Utah Div. of State Lands v. United States*, 482 U.S. 193, 197 (1987).

Although Congress rarely explicitly disposed of submerged lands, withdrawals and conveyances of large tracts of public lands containing submerged lands frequently occurred. The question of whether the disposition of uplands was intended to also include associated submerged lands is one that this Court has frequently addressed. The result has been two distinct tests for inferring whether congressional actions relating to public

lands were intended to defeat the future state's equal footing entitlement to submerged lands. The first test is used when Congress purports to *convey* an interest in submerged lands to third parties. *Montana*, 450 U.S. at 550-52. Under this test, the presumption against conveyance is overcome only where Congress' intent to convey the submerged lands was expressed in clear and especial words or definitely declared or otherwise made very plain. *Id.* at 554. Generally, conveyances are not inferred unless some international duty or public exigency compelled a conveyance. *Id.* at 552. In fact, this Court has confirmed a conveyance of submerged lands in only one, unique circumstance, that of an Indian tribe granted a fee patent to its reservation after repeated promises that the reservation would never be included in any State. *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970); *see also Utah Div. of State Lands*, 482 U.S. at 198 (noting that *Choctaw* was the "single case" where Supreme Court "concluded that Congress intended to grant sovereign lands to a private party").

Since a conveyance of submerged lands necessarily infers an intent to defeat a State's equal footing entitlement, this Court has adopted a second, more stringent test to use in those circumstances where Congress includes submerged lands within a federal reservation. *Utah Div. of State Lands*, 482 U.S. at 200-02. The reasoning underlying this stricter test is that a reservation of submerged lands is not necessarily inconsistent with the notion that the United States continues to hold the submerged lands in trust for the future state. *Id.* at 202. Therefore, this Court has held that congressional intent to defeat an equal footing entitlement through reservation

of submerged lands would be inferred only where Congress clearly intended to include the submerged lands within the federal reservation *and* where it is established that "Congress affirmatively intended to defeat the future State's title to such land." *Id.* Moreover, the Court has left open the possibility that all reservations of submerged lands are inherently insufficient to defeat a State's equal footing entitlement. *Id.* at 201.

The Coeur d'Alene Tribe bases its alleged title to the disputed beds and banks of Lake Coeur d'Alene to an Executive Order issued November 8, 1873. The Executive Order was issued pursuant to the President's general authority, not pursuant to a specific delegation of congressional authority. The appellate court stated that the Executive Order should be analyzed under this Court's test for conveyances of submerged lands, as modified by the Ninth Circuit. 42 F.3d at 1256-57, App. at 25-27. The court based its decision on the fact that a previous Ninth Circuit case involving an executive order reservation was treated as a conveyance of submerged lands to a Tribe. *Id.* at 1257, App. at 27. It also noted that this Court has treated *congressional* reservations in favor of tribes as conveyances for purposes of determining title to submerged lands. *Id.* at 1256, App. at 25-26.

The appellate court's opinion conflicts with numerous decisions of this Court. As discussed in *Utah Div. of State Lands*, 482 U.S. at 196-97, the power to convey submerged lands held in trust for future states is derived from the Property Clause of the United States Constitution, which provides that "The Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property

belonging to the United States." U.S. Const. Art. IV, § 3, cl. 2. Repeated decisions of this Court confirm that the authority over public lands vested in Congress by the Property Clause is exclusive. *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 326 (1942); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 404-06 (1917). The executive branch cannot dispose of public lands absent a delegation of congressional authority. *Sioux Tribe of Indians*, 316 U.S. at 326.

In *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915), this Court found that Congress, by a long-term pattern of acquiescence to presidential actions, had implicitly delegated to the President the authority to *withdraw* portions of the public domain from settlement. *Id.* at 469-74. The basis for the Court's holding, however, demonstrates that this implicit delegation is limited in effect. The Court held that implicit delegation was proper because "the land laws are not of a legislative character in the highest sense of the term, . . . 'but savor somewhat of mere rules prescribed by an owner of property for its disposal.' " *Id.* at 474 (quoting *Butte City Water Co. v. Baker*, 196 U.S. 119, 126 (1904)). Therefore, the President, acting as an agent of Congress, may withdraw lands from the public domain and place them into reserved status for specific federal purposes.

The delegation of authority implied by congressional acquiescence in *Midwest Oil* is specifically limited to the reservation or withdrawal of lands from the public domain: the President cannot *convey* title of federal lands without express congressional authorization. In *Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942), this Court reviewed the delegation "to withdraw public lands

from sale" as found in *Midwest Oil*, and addressed "whether a similar delegation occurred with respect to the power to convey a compensable interest in these lands to the Indians." *Id.* at 326. The Court found it "significant that the executive department consistently indicated its understanding that the rights and interests which the Indians enjoyed in executive order reservations were different from and less than their rights and interests in treaty or statute reservations." *Id.* at 327. After reviewing this and other indications of congressional intent, the Court concluded that Congress had never delegated authority to the President to convey reservation lands to Indian tribes. *Id.* at 331. Thus, tribes occupying executive order reservations hold no title or ownership to reservation lands. *Id.* Tribes residing on executive order reservations are "tenants at the will of the Government" and hold "a mere temporary and cancellable possessory right." *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 176, 178 (1947). Thus, the 1873 Executive Order establishing the Coeur d'Alene Reservation acted as a setting aside of public domain land for federal purposes, not as a conveyance of property interests to the Coeur d'Alene Tribe.

In short, the Ninth Circuit's decision ordering the district court to treat the 1873 Executive Order as a conveyance of interests to the Tribe cannot be reconciled with this Court's decisions denying the Executive's power to convey title of uplands to Indian tribes. If the President cannot convey uplands to Indian tribes, he clearly cannot convey submerged lands held in trust for future states.

Given the limited and revocable nature of executive order withdrawals and reservations, the inclusion of

submerged lands within an executive order reservation is not inconsistent with the notion of continued federal trusteeship of the submerged lands for the future state.

History demonstrates that executive order withdrawals were often hastily issued in response to immediate needs. *See, e.g., Sioux Tribe of Indians*, 316 U.S. at 319-22 (describing four executive orders issued in the space of two years enlarging the Great Sioux Reservation in order to suppress liquor trafficking). It is unlikely that extensive effort was made to precisely define exclusions from executive order withdrawals and reservations. Instead, the Executive relied on statutes and general principles of law to define the actual use and final disposition of the lands withdrawn for the use of tribes. A revocable executive order should not be deemed sufficient to defeat, through implication, one of the most fundamental attributes of state sovereignty, ownership of the submerged lands within a State. Assuming for the sake of argument, however, that an executive order could ever defeat a State's title to submerged lands, it must be demonstrated, at the very minimum, that the executive order was affirmatively intended to defeat the State's equal footing entitlement, as required in *Utah Div. of State Lands* for congressional reservations of submerged lands.

This is no academic question. Rather, the Ninth Circuit's decision raises real life impacts for all States and all citizens of the United States. Executive order Indian reservations are found throughout the western United States, and many contain submerged lands. The Ninth Circuit's decision throws a cloud over many sovereign submerged lands that have for more than 100 years been administered by the States for the benefit of the general

public under the belief that only congressional acts or treaties can defeat state ownership. Suddenly, the States' title to submerged lands will be subject to attack based upon vaguely worded executive orders that were not subject to the careful scrutiny that follows from congressional action.

In summary, this case merits the Court's review, as the Ninth Circuit's decision directly conflicts with the decisions of this Court and presents an issue important to federal-state relations and tribal-state relations. If allowed to stand, the Ninth Circuit's decision will seriously undermine state claims to submerged lands within many federal reservations, contrary to this Court's decisions recognizing and protecting the equal footing entitlements of the States.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COEUR D'ALENE TRIBE OF IDAHO, in its own right and as the beneficially interested party subject to the trusteeship of the UNITED STATES OF AMERICA; ERNEST L. STENSGAR; LAWRENCE ARIPA; MARGARET JOSÉ; DOMNICK CURLEY; AL GARRICK; NORMA PEONE; HENRY SIJOHN, individually, in their official capacity and on behalf of all enrolled members of the COEUR D'ALENE TRIBE OF IDAHO, *Plaintiffs-Appellants,* v. STATE OF IDAHO; CECIL D. ANDRUS, Governor; PETE CENARRUSA, Secretary of State; LARRY ECHOHAWK, Attorney General; J.D. WILLIAMS, Auditor; JERRY EVANS, Superintendent of Public Instruction; KEITH HIGGINSON, Director, Dep't of Water Resources, each individually and in his official capacity; IDAHO STATE BOARD OF LAND COMMISSIONERS; IDAHO STATE DEPARTMENT OF WATER RESOURCES, *Defendants-Appellees.*	No. 92-36703 D.C. No. CV 91-437-HLR OPINION

Appeal from the United States District Court
for the District of Idaho
Harold L. Ryan, District Judge, Presiding

Argued and Submitted
February 2, 1994 – Seattle, Washington

Filed December 9, 1994

Before: Eugene A. Wright, Thomas M. Reavley,* and Edward Leavy, Circuit Judges.

Opinion by Judge Leavy

COUNSEL

Raymond C. Givens and Shannon D. Work, Givens & Funke, Coeur d'Alene, Idaho, for the plaintiffs-appellants.

Steven W. Strack, Deputy Attorney General, Boise, Idaho, for the defendants-appellees.

OPINION

LEAVY, Circuit Judge:

An Indian tribe brought this action against a state, state agencies, and state officials for quiet title, injunctive relief, and declaratory relief. The district court dismissed all the claims on the grounds of Eleventh Amendment immunity and failure to state a claim. The Indian tribe appeals. We affirm in part, reverse in part, and remand.

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*Honorable Thomas M. Reavley, Senior Judge for the United States Court of Appeals for the Fifth Circuit, sitting by designation.

FACTS

The Coeur d'Alene Indian Tribe (the Tribe) brought this action in federal district court in Idaho naming the State of Idaho, several state agencies (the Agencies), and several state officials (the Officials) as defendants. The Tribe claims title to all of the submerged lands within the boundaries of its reservation that were established by Executive Order on November 8, 1873, and ratified by Congress in 1891, 26 Stat. 543, § 19 (1981), including Lake Coeur d'Alene. The Tribe alternatively claims ownership of these lands pursuant to unextinguished aboriginal title. The Tribe's claim to these lands includes a claim to the water on the land. The Tribe brought this suit to quiet title to these lands and waters in its name, and for declaratory and injunctive relief to preclude regulation or interference with possession by the Agencies and Officials.

Defendants moved to dismiss the Tribe's complaint on Eleventh Amendment immunity grounds, and for failure to state a claim upon which relief could be granted. The district court dismissed the Tribe's entire claim. *Coeur d'Alene Tribe of Idaho v. Idaho*, 798 F. Supp. 1443 (D. Idaho 1992). The court concluded that the Eleventh Amendment barred the claims against Idaho and the Agencies. *Id.* at 1448. The district court also concluded that the claims against the Officials for quiet title and declaratory relief were barred by the Eleventh Amendment because these claims were the functional equivalents of a damage award against the State. *Id.* at 1448-49. Finally, the district court dismissed the claim for injunctive relief against the Officials, holding that as a matter of law, Idaho is in rightful possession of the land at issue. *Id.* at 1452.

We agree that the Eleventh Amendment bars all claims against the State and the Agencies, as well as the quiet title claim against the Officials, and affirm the district court's judgment on these claims. To the extent that the claims for injunctive and declaratory relief against the Officials seek only to preclude future violations of federal law, we conclude that these actions are not barred by the Eleventh Amendment, and reverse the district court's judgment on these claims. Because the Tribe has an arguable claim to ownership of the property at issue, we also reverse the district court's dismissal for failure to state a claim.

DISCUSSION

I. *Idaho and State Agency Defendants*

With limited exceptions, a state's sovereign immunity as recognized by the Eleventh Amendment of the United States Constitution bars suit against it in federal courts. The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against any one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Although the Eleventh Amendment by its terms bars only actions brought by citizens of sister states or foreign countries, the Supreme Court "has recognized that [the Eleventh Amendment's] greater significance lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III."

Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 98 (1984) (hereinafter *Pennhurst*). "[T]he Eleventh Amendment . . . stand[s] not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact [and] that the judicial authority in Article III is limited by this sovereignty. . . . " *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 111 S. Ct. 2578, 2581 (1991) (citations omitted). A state's Eleventh Amendment immunity applies to suits in equity as well as in law, *Missouri v. Fiske*, 290 U.S. 18, 27 (1933), and to state agencies as well as states, *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 684 (1982); *Almond Hill Sch. v. United States Dep't of Agric.*, 768 F.2d 1030, 1034 (1985). This immunity can only be surrendered in the plan of convention, waived by the state, or abrogated by Congress. *Almond Hill Sch.*, 768 F.2d at 1034-35. None of these limitations on Idaho's Eleventh Amendment immunity applies here.

A. *The Plan of Convention*

The plan of convention implicitly surrenders the states' immunity to certain other sovereigns when the states enter the Union. *See Blatchford*, 111 S. Ct. at 2582. The Supreme Court has recognized only two sovereigns to which every state has surrendered its immunity through the plan of convention: sister states, *South Dakota v. North Carolina*, 192 U.S. 286 (1904), and the United States, *Blatchford*, 111 S. Ct. at 2582; *United States v. Texas*, 143 U.S. 621 (1892).

In *Blatchford*, the Court held that the plan of convention does not surrender the states' immunity to Indian tribes in an action for damages. 111 S. Ct. at 2583. The Court had previously held that because Indian tribes were not parties to the constitutional convention, the tribes could not have consented to suit in the convention. *Id.* at 2583 (citing *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991)). Because "[w]hat makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession," *id.* at 2582, the Court reasoned that the lack of mutuality of any waiver of immunity to suit by tribes necessarily led to the conclusion that the states also had not accepted such a waiver in the plan of convention. *Id.* at 2583.

Although *Blatchford* involved only an action for damages, its reasoning applies equally to actions for injunctive relief, because Indian tribes are also immune from actions by states for injunctive relief. *Rehner v. Rice*, 678 F.2d 1340, 1351 (9th Cir. 1982), *rev'd on other grounds*, 463 U.S. 713 (1983); *California v. Quechan Tribe of Indians*, 595 F.2d 1153 (9th Cir. 1979). It is well-established that a state's Eleventh Amendment immunity bars suits against the state and state agencies for equitable relief as well as for damages. *Pennhurst*, 465 U.S. at 100. If the states did not surrender their immunity from suit by tribes for damages through the plan of convention, we fail to see how they could have surrendered their immunity from suit for injunctive or declaratory relief.[1]

[1] *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548 (1991), does not hold otherwise. Despite the language in that case, which in many places is directed against the State of Alaska, we specifically held only that "the eleventh amendment does not bar the plaintiffs' request for injunctive [and declaratory] relief against *the Commissioner of the Department of Health and Social Services.*" *Id.* at 552 (emphasis added).

B. *Consent to Suit*

A state may waive its privilege of immunity from suit. *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304 (1990). To waive its Eleventh Amendment immunity, a state must unequivocally express its consent to be sued. *Pennhurst*, 465 U.S. at 99. The Tribe claims that Idaho has waived its immunity in three ways.

First, the Tribe argues that Idaho courts have waived the state's immunity by ruling that actions against the state to quiet title are not claims against the sovereign.[2] *Lyon v. State*, 283 P.2d 1105, 1106 (Idaho 1955); *Roddy v. State*, 139 P.2d 1005, 1010 (Idaho 1943). In *Lyon*, the Idaho Supreme Court rejected the state's motion to dismiss due to common law sovereign immunity because "[t]he appellants by the proceeding [to quiet title] are asserting no claim against the sovereignty, but are attempting to retain what they allegedly own." *Lyon*, 283 P.2d at 1106. The Tribe concludes that Idaho and the Agencies have no

[2] Stated another way, the Tribe argues not that the state *waived* its immunity, but rather that the state *had* no immunity to waive. Restating the argument does not alter the result, however. The Tribe names the state and the Agencies as defendants, and is clearly attempting to sue them in federal court. As the state's Eleventh Amendment immunity is immunity from suit of any kind, the state court's characterization of a particular action cannot overcome this bar.

Eleventh Amendment immunity in a proceeding to quiet title such as this one.

We disagree. A state's immunity from suit in state court as determined by a state court is not necessarily coextensive with Eleventh Amendment immunity from suit in federal court. *See Edelman v. Jordan*, 415 U.S. 651, 677 n. 19 (1974) ("Whether [the state] permits such a suit to be brought against the State in its own courts is not determinative of whether [it] has relinquished its Eleventh Amendment immunity from suit in the federal courts."); *Aquilar v. Kleppe*, 424 F. Supp. 433, 436 (D. Alaska 1976) ("prohibition placed on the power of the federal judiciary by the eleventh amendment exceeds the common law doctrine of sovereign immunity"). We will not infer a waiver of Eleventh Amendment immunity based on a state court holding that no sovereign immunity bars its own jurisdiction.

Second, the Tribe argues that Idaho waived its Eleventh Amendment immunity by adopting the Idaho Constitution, which disclaims any interest in Indian lands within the state. The Idaho Constitution provides:

> And the people of the state of Idaho do agree and declare that we forever disclaim all right and title . . . to all lands lying within [the state of Idaho] owned or held by any Indians or Indian tribes; and until the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States . . . .

Idaho Const. art. 21, § 19. We have held that virtually identical language in other state constitutions does not constitute a waiver of Eleventh Amendment immunity from suit by Indians or Indian tribes. *See Harrison v. Hickel*, 6 F.3d 1347, 1354 (9th Cir. 1993) (Alaska Statehood Act disclaiming "all right and title . . . to any lands . . . the right or title to which may be held by any" native, not sufficient to waive Alaska's Eleventh Amendment immunity to suit by Indian claimants to quiet title to disputed land (quoting Alaska Statehood Act, § 4, Pub. L. No. 85-508, 72 Stat. 339 (1958))); *Skokomish Indian Tribe v. France*, 269 F.2d 555, 562 (9th Cir. 1959) (Washington State Constitution disclaiming forever any right and title to "all lands lying within [the state] owned or held by any Indian or Indian Tribes" not sufficient to waive Washington's Eleventh Amendment immunity to suit by Indian tribe to quiet title to disputed land (quoting Wash. Const. art. XXVI, § 2)). We likewise conclude that Idaho did not waive its immunity from suit by Indian tribes in its constitution.

Finally, the Tribe argues that Idaho waived its immunity from Indian land claims by agreeing in its constitution that Congress has absolute jurisdiction and control over Indian lands. Idaho Const. Art. 21, § 19. It further argues that Congress exercised that control by granting tribes the right to sue the state in federal court pursuant to 28 U.S.C. § 1362.[3]

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[3] 28 U.S.C. § 1362 provides:
The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy

We conclude that this argument is foreclosed by the Supreme Court's holding in *Blatchford*. In that case, the Court rejected the argument that Congress had delegated to the tribes the federal government's exemption from state sovereign immunity by enacting 28 U.S.C. § 1362. 111 S. Ct. at 2584. We fail to see a significant difference in the Tribe's argument here. If Idaho waived its immunity from suit through its constitution by recognizing that Congress alone has jurisdiction over Indian lands, the waiver was in favor of the United States only. We can find no reason to read more into section 1362 on behalf of tribes suing Idaho than the Supreme Court did on behalf of native villages suing Alaska. We thus affirm the district court's dismissal of the action against Idaho and the Agencies.

II. *Defendant State Officials*

Generally, state officials in their official capacities are considered to be acting on behalf of the state, and the Eleventh Amendment therefore shields them from suit. *See Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985); *Pennhurst*, 465 U.S. at 101-02. The courts have, however, fashioned narrow exceptions to this rule. A plurality of the Supreme Court provided the following test to determine whether a suit against state officials is barred by the Eleventh Amendment:

> (a) Is this action asserted against officials of the State or is it an action brought directly

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arises under the Constitution, laws, or treaties of the United States.

> against the State . . . itself? (b) Does the challenged conduct of state officials constitute an ultra vires or unconstitutional withholding of property or merely a tortious interference with property rights? (c) Is the relief sought by [plaintiffs] permissible prospective relief or is it analogous to a retroactive award that requires "the payment of funds from the state treasury?"

Treasure Salvors, 458 U.S. at 690 (quoting *Quern v. Jordan*, 440 U.S. 332, 346-47 (1979)).[4] The Tribe must prevail on each part of this three-part test or the Eleventh Amendment bars the action against the Officials.

A. *Real Party in Interest*

When, as here, public officials are the nominal defendants, "a question arises as to whether [the] suit is a suit against the State itself." *Pennhurst*, 465 U.S. at 101.

> "The general rule is that a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act."

Id. at 101 n.11 (quoting *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (internal quotations omitted)).

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[4] Although *Treasure Salvors* was an *in rem* admiralty action, the Court noted "the question presented for our decision would not be any different if the State merely resisted an attachment of property located within the district." *Id.* at 683. The test therefore applies to this action.

While this would appear to preclude relief in this case, the courts have established an important exception to this general rule. An action claiming that state officials are violating federal law is deemed not to be an action against the state, and thus is not barred by the state's immunity. *See Pennhurst*, 465 U.S. at 102 ("a suit challenging the constitutionality of a state official's action is not one against the State"); *Almond Hill Sch.*, 768 F.2d at 1034 (exception applies to alleged violations of federal statutes).

Under our federalist system, the states are considered unable to act in a manner contrary to federal law. Thus any action on the part of state officials that violates federal law cannot be attributed to the state. *Ex parte Young*, 209 U.S. 123, 159-60 (1908). Because federal law preempts state law, if the property at issue in this case belongs to the Tribe pursuant to federal law, the Officials must conform their actions to that federal law in spite of state statutes that purport to regulate the property as belonging to the state. If the Officials do not act in accordance with federal law, the state's claim of ownership cannot clothe the Officials in Eleventh Amendment immunity from suit.

This case fits within the exception. The Tribe alleges that it holds the property at issue pursuant to an executive order that was ratified as a federal statute. *See* 26 Stat. 543 § 19 (1891). Because the Tribe has alleged that the actions of the Officials in exercising control over the property at issue violate this federal law, the Officials must be considered the real parties in interest in the claims against them.

B. *Violation of Federal Law vs. Tortious Conduct*

Under the second prong of the test, we ask whether the challenged conduct either violates federal law, or is wholly unauthorized by state law. If state officials act within the authority of state law and violate no federal rights, their interference with a plaintiff's legal rights is merely tortious, and is protected by the Eleventh Amendment. *Treasure Salvors*, 458 U.S. at 692-697; *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 692 (1949).

The Supreme Court has recognized that the determination of whether a plaintiff's federal rights are being violated may ultimately depend on the decision that the court reaches on the merits of the claim. *Larson*, 337 U.S. at 690. Thus, a plaintiff need only adequately allege an ongoing violation of a federal right to meet this prong of the test. *Cf. id.* at 690 n.10 (dismissal for lack of jurisdiction is proper if claim of violation of federal law is clearly frivolous or insubstantial); *Tindal v. Wesley*, 167 U.S. 204, 216 (1897) ("It is to be presumed in favor of the jurisdiction of the court that the plaintiff may be able to prove the right which he asserts in his declaration"). The possibility that a defendant will ultimately prevail on the merits does not clothe that defendant in Eleventh Amendment immunity.[5] *See Scheuer v. Rhodes*, 416 U.S.

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[5] We have previously held that where the plaintiff does not allege a violation of federal law, but rather alleges that the defendant lacked authority for his or her actions *pursuant to state law*, the Eleventh Amendment will bar the action unless the defendant had no colorable state authority for his or her actions. *See Marx v. Government of Guam*, 866 F.2d 294, 299-300 (9th Cir.

232, 238 (1974). The Tribe adequately alleges an ongoing violation of a federal right and, thus, meets this prong of the test.

C. *Remedy Sought*

The third and final prong of the test is whether the relief sought is permissible prospective relief, or is instead comparable to damages. "The eleventh amendment bars . . . suits against . . . state officials in their official capacity when the relief sought is *retrospective* in nature, i.e. damages." *Ulaleo v. Paty*, 902 F.2d 1395, 1398 (9th Cir. 1990). Although it has often been stated that the Eleventh Amendment forbids relief that would require the payment of funds from the state treasury, the overriding question is whether the relief sought would remedy *future* rather than *past* wrongs. An injunction that will in practical effect require payment of funds out of the state treasury is nonetheless permissible if it requires only that officials conform their future actions to federal law. *Quern v. Jordan*, 440 U.S. 332, 337 (1979).

The Supreme Court has long held that an action against state officials to enjoin an ongoing violation of federal law is not precluded by virtue of the fact that the determination of the controversy necessarily involves a

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1989) (citing *Treasure Salvors*, 458 U.S. at 682). We do not take either *Treasure Salvors* or *Marx* to mean that a state official is immune from an action seeking to enjoin him or her from violating federal law if the official's interpretation of federal law is colorable. Such a holding would constitute a marked departure from previous Eleventh Amendment jurisprudence.

question of the state ownership of property. *Treasure Salvors*, 458 U.S. at 685-87; *Tindal*, 167 U.S. at 213-222; *Ex parte Tyler*, 149 U.S. 164, 190 (1893).[6] As the Court stated in *Tindal*:

> The settled doctrine of this court wholly precludes the idea that a suit against individuals to recover possession of real property is a suit against the state simply because the defendant holding possession happens to be an officer of the state and asserts that he is lawfully in possession on its behalf.

Tindal, 167 U.S. at 221.[7]

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[6] The same principle allows injunctive relief against federal officials without the consent of the United States for the wrongful interference with property. *Dugan v. Rank*, 372 U.S. 609, 621-22 (1963); *Malone v. Bowdoin*, 369 U.S. 643, 647-48 (1962); *Philadelphia Co. v. Stimson*, 223 U.S. 605, 619-21 (1912); *United States v. Lee*, 106 U.S. 196, 210-11 (1882). Although cases against federal officials are no longer necessary because the United States has waived its sovereign immunity to actions to quiet title, 28 U.S.C. § 2409a, the underlying principle remains valid. *See Block v. North Dakota*, 461 U.S. 273, 281-82 (1983).

[7] The Fifth Circuit has held that the Supreme Court overruled *Tindal* in *Larson*, 337 U.S. 682, and that this line of cases therefore provides no support for the proposition that an action for an injunction against a state official to deliver possession of property is not barred by the Eleventh Amendment. *John G. and Marie Stella Kenedy Memorial Foundation v. Mauro*, 21 F.3d 667, 673 (5th Cir. 1994) (citing *Pennhurst*, 465 U.S. at 110 n.19). We respectfully disagree. *Pennhurst* concludes that to the extent that *Tindal* was a tort case, it was overruled by *Larson*. However, to the extent that *Tindal* alleged a violation of a federal right, it clearly remains valid. *See Treasure Salvors*, 458 U.S. at 685-89 (Stevens, J., plurality opinion), 706 (White, J., concurring and dissenting).

The Supreme Court's latest opinion involving property claimed by a state is *Treasure Salvors*. While the circuit courts have reached varying conclusions based upon that case, we think that it established two clear rules that are relevant to the case before us. First, federal courts may not hear actions to quiet title to property in which the state claims an interest, without the state's consent. *See id.*

Second, declaratory and injunctive relief against state officials to foreclose future violations of federal law is available even if that relief works to put the plaintiff in possession of property also claimed by the state. *See id.* While the conflict between these two rules presents a conceptual difficulty that perhaps cannot be resolved logically, we are nevertheless bound by both. *See Manypenny v. United States*, 948 F.2d 1057, 1069 n.4 (8th Cir. 1991) (Gibson, J., concurring and dissenting).

The Officials rely on several circuit and district court cases that have held that declaratory and injunctive relief that necessarily involves the adjudication of a state's interest in real property is comparable to damages, and therefore precluded in the absence of the state's consent. *See Mauro*, 21 F.3d 667, 673 (5th Cir. 1994); *Fitzgerald v. Unidentified Wrecked and Abandoned Vessel*, 866 F.2d 16, 18 (1st Cir. 1989); *Toledo, Peoria & Western R.R. v. Illinois Dep't of Transp.*, 744 F.2d 1296, 1299 n.1 (7th Cir. 1984) *cert. denied*, 470 U.S. 1051 (1985); *Aquilar v. Kleppe*, 424 F. Supp. 433, 437 (D. Alaska 1976). A case recently decided by this court appears to support this conclusion. *See Harrison v. Hickel*, 6 F.3d 1347, 1348 (9th Cir. 1993).

Some of these cases are distinguishable. *Toledo, Peoria & Western* held only that "[t]he eleventh amendment bars a federal action against state officials *based on state law* when the relief sought directly impacts the state." 744 F.2d at 1299 (emphasis added). The plaintiff's claims of violations of federal rights in that case were defeated by the availability of a remedy in the Illinois Court of Claims,[8] which left only state law claims. Any support found in that case for the proposition that a *federal* claim against state officials for possession of property is precluded if it is "an action nominally against the [state] officials but in fact against the state," *id.*, is thus dicta.

We read the Ninth Circuit and District of Alaska cases to mean only that an action that would conclusively adjudicate the state's title to property cannot be brought without the state's consent. *See Harrison*, 6 F.3d at 1348 (affirming dismissal of claims against individual defendants "because the quiet title relief sought . . . directly affects the interests of the State"); *Aquilar*, 424 F. Supp. at 437 (plaintiffs sought to have the court "declare certain portions of the patents void *ab initio*"). While these cases could admittedly be read to support a holding that injunctive relief against a state official is barred if the official holds the disputed property based on the state's claim of ownership, such a reading is foreclosed by Supreme Court precedent.

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[8] Actions that involve federal claims of takings without just compensation or due process can be defeated by a showing that the state provides a post-deprivation remedy. *Larson*, 337 U.S. at 697 n.18. In contrast, states cannot provide a remedy for the taking of Indian lands that are held pursuant to federal law. *See* 25 U.S.C. § 177.

The First Circuit case *Fitzgerald* and the Fifth Circuit case *Mauro* are more difficult to reconcile. We note that like *Toledo, Peoria & Western, Fitzgerald* did not involve a claim of violations of federal law. However, the case appears to hold that when an action includes the state and state agencies as defendants, and seeks an adjudication of the state's interest in property, that portion of the action that is against state officials for injunctive and declaratory relief is also directed against the state itself, and is therefore barred. *Fitzgerald*, 866 F.2d at 18.

In *Mauro*, the plaintiff alleged that the defendant state official was depriving the plaintiff of its property without due process of law. 21 F.3d at 672. The plaintiff sought injunctive relief forbidding the leasing of the property for mineral development, as well as a declaration of title. The Fifth Circuit held that all of the relief sought was barred by the Eleventh Amendment because "a federal court does not have the power to adjudicate the State's interest in property without the State's consent." *Id*. The court refused to hear the claims for declaratory and injunctive relief against the state official because it believed that to do so it would have to adjudicate the state's interest in the property.

Although the Fifth Circuit attempted to distinguish *Treasure Salvors, id*. at 673, we do not find its reasoning persuasive. As in *Mauro* and *Fitzgerald*, the plaintiffs in *Treasure Salvors* asked that they be declared the owners of property as against the state. The Supreme Court held that while this relief was barred by the Eleventh Amendment, the ancillary claims for declaratory and injunctive relief against state officials could go forward. 458 U.S. at 684.

On an initial reading, the logic underlying *Fitzgerald* and *Mauro* seems compelling. Starting from the indisputable proposition that a federal court may not adjudicate the state's interest in property without the state's consent, *Treasure Salvors*, 458 U.S. at 682, the outcome of these cases (that the state officials are also protected by the Eleventh Amendment) appears inevitable. On the other hand, reasoning from the equally indisputable proposition that a "federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law, even though such an injunction may have an ancillary effect on the state treasury," *Quern*, 440 U.S. at 337, leads to the ultimate conclusion that a quiet title action should be permissible. Thus while both propositions are valid, their ultimate logical conclusions are faulty. The Supreme Court has charted a middle ground between the necessarily conflicting doctrines of state sovereign immunity and the supremacy of federal law. It should come as no surprise that that middle ground does not wholly conform to either doctrine.

Following *Ex parte Young*, we have had little difficulty concluding that an injunction against a state official forbidding the enforcement of a state law is not an injunction against the state if the state law conflicts with federal law. *See, e.g., Los Angeles County Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992); *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 552 (9th Cir. 1991).[9] At the

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[9] Ironically, *Ex parte Young*, which is generally credited for establishing this exception, followed what was already a well-

time of *Ex parte Young*, the conceptual difficulty was with actions that restrained the state from acting through its officials to enforce state laws, rather than with actions that implicated the state's ownership of property. The Supreme Court's reply to this difficulty is equally valid today, although it would perhaps be better stated inversely:

> The difference between an actual and direct interference with tangible property and the enjoining of state officers from enforcing an unconstitutional act, is not of a radical nature, and does not extend, in truth, the jurisdiction of the courts over the subject matter. In the case of the interference with property the person enjoined is assuming to act in his capacity as an official of the State, and justification for his interference is claimed by reason of his position as a state official. Such official cannot so justify when acting under an unconstitutional enactment of the legislature. So, where the state official, instead of directly interfering with tangible property, is about to commence suits, which have for their object the enforcement of an act which violates the Federal Constitution . . . he is seeking the same justification from the authority of the State as in other cases. The sovereignty of the State is, in reality, no more involved in one case than in the other. The State cannot in either case impart to the official immunity from

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established rule that a state official who claimed to hold property on behalf of the State could be sued in federal court without the State's permission and required to deliver possession of the property to its rightful owner. *See Ex parte Young*, 209 U.S. at 167 (citing, *In re Ayers*, 123 U.S. 443, 507 (1887)); *Osborn v. United States Bank*, 22 U.S. (9 Wheat.) 738 (1824).

> responsibility to the supreme authority of the United States.

209 U.S. at 167.

Cases involving property claimed by the state do, however, present an additional difficulty in that the fiction that an action in violation of federal law cannot be an action of the state breaks down when confronted by the state's claim of title to property. Whatever else a state can or cannot do, it apparently can claim title to property in derogation of federal law. In such an instance, the state is protected from suit by the Eleventh Amendment. However, this creates no exception to the rule that when federal law conflicts with the state's claim, state officials must act in conformance with federal law, and can be compelled to do so by the federal courts. To resolve this conundrum, courts have allowed all relief other than relief that would foreclose the State's claim in future judicial proceedings. *See Treasure Salvors*, 458 U.S. at 699-700; *Tindal*, 167 U.S. at 223; *Zych v. Wrecked and Abandoned Vessel Believed to be the Lady Elgin*, 960 F.2d 665, 670 (7th Cir.) *cert. denied*, 113 S. Ct. 491 (1992); *Florida Dep't of State v. Treasure Salvors*, 689 F.2d 1254, 1256 (5th Cir. 1982) (per curiam, quorum opinion) (hereinafter *Treasure Salvors II*).

We thus affirm the district court's dismissal of the quiet title claim. However, because the injunctive and declaratory relief sought by the Tribe would not compensate for past violations of federal law, but would instead preclude future violations, we conclude that this portion of the action is not barred by the state's immunity. The Tribe is not seeking to have any past violations of its

federal rights redressed in any way. It is not seeking damages or restitution for past wrongs, *compare Edelman*, 415 U.S. at 668-69, nor is it seeking to rescind a past transfer of property, *compare Ulaleo*, 902 F.2d at 1399-1400. Rather, it seeks a determination under federal law of the Tribe's right to possess, use, and control the beds, banks, and waters of navigable waterways within the Coeur d'Alene Reservation in the future. Thus to the extent that the declaratory and injunctive relief binds state officials in accordance with what the district court finds to be the Tribe's right to the property, it is allowable. Because the state is unable to act in violation of federal law, declaratory relief that determines what federal law *is* and requires state officials to act accordingly cannot be considered relief against the state. We follow the Fifth Circuit's disposition of *Treasure Salvors* after remand from the Supreme Court, and conclude that if the district court finds that the property at issue belongs to the Tribe pursuant to federal law, it may decree the Tribe to be the owner of the property against all claimants except the State of Idaho and its agencies. *See Treasure Salvors II*, 689 F.2d at 1256; *Zych*, 960 F.2d at 670.

We recognize that if the Tribe ultimately prevails on the merits of this case, neither Idaho nor the Tribe will hold unclouded title to the property. The plaintiffs in *Treasure Salvors* apparently complained of just such a problem subsequent to the Supreme Court's disposition of that case. *See Treasure Salvors II*, 689 F.2d at 1256. Our conclusion undoubtedly will not satisfy any of the parties involved. However, just as we may not exercise jurisdiction over the state to more fully resolve this controversy, we may not decline jurisdiction to the extent that it exists.

See Ex parte Young, 209 U.S. at 143. We will not refuse to enforce the federal rights of Indian tribes against action by state officials merely because we cannot afford them complete relief.

III. *Section 1983*

None of the claims discussed above differ when analyzed under 42 U.S.C. § 1983. To the extent that Eleventh Amendment immunity bars the Tribe's claims, section 1983 does not help them. *See Edelman*, 415 U.S. at 677. To the extent that the suit is for prospective injunctive relief and is not barred by the Eleventh Amendment, a state official may be sued in his or her official capacity under section 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989).

The Tribe argues that the individual plaintiffs have permissible section 1983 claims against the officials acting in their individual capacities. We agree. Injunctive relief is available against state officials in their individual capacities under section 1983. *Hale v. Arizona*, 967 F.2d 1356, 1369 (1992), *rev'd on other grounds*, 993 F.2d 1387 (9th Cir.) (en banc), *cert. denied*, 114 S. Ct. 386 (1993). Although the plaintiffs do not appear to be seeking any additional relief against the defendant officials as individuals, the action against them is proper in either capacity. Of course, they may have defenses available to them as individuals that are not available to them as officials. *See Kentucky v. Graham*, 473 U.S. at 166-67.

IV. *Dismissal for Failure to State a Claim*

The district court held that the Tribe failed to state a claim on which relief could be granted. 798 F. Supp. at 1446. In its complaint, the Tribe alleges that it holds title to the submerged land pursuant to an Executive Order executed prior to the time that Idaho attained statehood. Such title, if proven, would defeat the officials' claim that they have authority to hold and regulate the property pursuant to the State's ownership. *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1257-59 (9th Cir. 1983).

When a state enters the union it takes title to all submerged land beneath navigable waters unless the United States has conveyed that land prior to statehood. *Montana v. United States*, 450 U.S. 544, 551 (1981). Although there is a strong presumption against conveyance, that presumption is rebuttable. *Id.* at 552.

> In *Montana v. United States*, the Supreme Court considered a tribe's claim of title to the bed of a navigable river as it flowed through the tribe's reservation. 450 U.S. at 550-57, 101 S. Ct. at 1250-54. The Court's analysis of this issue starts from the premise that "[a] court deciding a question of title to the bed of a navigable water must . . . begin with a strong presumption against conveyance by the United States, . . . and must not infer such a conveyance 'unless the intention was definitely declared or otherwise made very plain.' " (citations omitted)

Puyallup, 717 F.2d at 1257 (citing *Montana* at 552).

To make this showing, the Tribe may rely on evidence beyond the federal enactment that established the reservation. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631-35

(1970) (considering meaning parties likely gave to treaty language); *Montana*, 450 U.S. at 556 (considering evidence of Tribe's life-style at time of reservation); *United States v. Aam*, 887 F.2d 190, 195 (9th Cir. 1989) ("inquiry focus[es] on the circumstances surrounding the creation of the reservation").

The State argues that as a matter of law the Executive Order of 1873 by its terms could not have transferred the submerged lands to the Tribe. This argument, however, fails for a variety of reasons.

The State first analogizes the language of the 1873 Executive Order ("withdrawn from sale and set apart as a reservation") to the language in *Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987), ("reserved from sale as the property of the United States") which the Supreme Court found insufficient to create a "reservation" of interest in submerged land. 482 U.S. at 203. Based on this analogy, the State concludes that the federal government cannot "reserve" submerged lands in a manner sufficient to withstand the "equal footing doctrine".

The "reservation" at issue here, however, is legally different from the "reservation" before the Supreme Court in *Utah Div. of State Lands*. In that case the issue was whether the federal government, by a general land law, could reserve *for itself* interests in submerged lands that would not be transferred upon admission to the state under "equal footing." In its 1987 opinion, the Supreme Court stated explicitly that it had *never* before decided whether the federal government's "reservation" of submerged lands could prevent title from passing to a state upon admission to the Union under the "equal footing"

doctrine. 482 U.S. at 200-01. Yet, in *Montana*, decided six years earlier, the Supreme Court had already dealt with an Indian reservation created by language very similar to that at issue in the present appeal,[10] and explicitly treated the interest possessed by Indians in a "reservation" as a "grant" or "conveyance." 450 U.S. at 554. Given this prior holding, it is clear that the meaning of "reservation" in *Utah Div. of State Lands* is to be distinguished from the meaning of "reservation" when applied to the creation of Indian title. Thus, *Utah Div. of State Lands* is not applicable to the present case.

The State also argues that the President could not convey submerged lands by an executive order without express congressional authorization and that no implied authorization could justify such a conveyance. The State argues, without citing to any authority, that executive orders creating an interest in bedlands must be issued with explicit prior congressional approval or subsequent ratification. Since there was no ratification of the 1873 Executive Order creating the Coeur d'Alene reservation prior to Idaho's admission to statehood, the State argues that title to the bedlands passed to it under the equal footing doctrine. In support of this argument, the State

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[10] Article II of the 1868 Treaty with the Crow Indians, at issue in *Montana*, provides in part: "The United States agrees that the following district of country [is] . . . set apart for the absolute and undisturbed use and occupation of the Indians herein named . . . ". 15 Stat. 650 (1869). The present appeal involving the Executive Order of 1873 used the terms, "withdrawn from sale and set apart." Variation on such language is typical of Indian agreements creating reservations. *See* F. Cohen, *Handbook of Federal Indian Law*, 477 (1982).

notes that other court decisions finding an executive order conveyance of bedlands to Indians have all been supported by explicit congressional authorization.

This, however, does not appear to be the case. The State, for example, relies on *Puyallup*, 717 F.2d at 1251, to support its contention. It argues that although we found that the executive order conveyed title to a riverbed, the district court had found that the executive order had been issued pursuant to Article II of the Treaty of Medicine Creek, 10 Stat. 1132 (1854). *Puyallup Tribe of Indians v. Port of Tacoma*, 525 F. Supp. 65, 72 (W.D. Wash 1981). In fact, the treaty makes no reference whatsoever to conveyance of riverbeds nor does it provide any authorization for the President to convey such lands. If the State's contention were true, we would have denied the Tribe's claim of the riverbed due to lack of explicit congressional authorization to convey riverbeds.

We can find no decision which mentions the rationale offered by the state as a possible ground for denying a tribal claim. Two of our fairly recent cases denied tribal claims for riverbeds in relation to reservations created in part by executive order.[11] Nowhere in our opinions did we consider the possibility that such a claim might be defeated by a lack of explicit congressional authorization of the executive order.

As it is conceivable that the Tribe could prove facts that would entitle it to the relief sought, dismissal for failure to state a claim was error.

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[11] *United States v. Aam*, 887 F.2d 190 (9th Cir. 1989); *United States v. Aranson*, 696 F.2d 654 (9th Cir. 1983).

Additionally, the Coeur d'Alene tribe states a claim in Count One of their complaint for a declaratory judgment concerning aboriginal title to the beds and banks of all navigable waters within the 1873 Reservation which they allege has never been ceded or extinguished. The district court without discussion improperly dismissed this claim under Rule 12(b)(6). On remand the district court should resolve the issue of whether the Tribe is entitled to declaratory relief.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED. Each party shall bear their own costs.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

IN THE MATTER OF THE OWNERSHIP OF THE BEDS AND BANKS AND ALL WATERS OF ALL NAVIGABLE WATER COURSES WITHIN THE 1873 COEUR D'ALENE RESERVATION BOUNDARY.	
COEUR D'ALENE TRIBE OF IDAHO, in its own right and as the beneficially interested party subject to the trusteeship of the UNITED STATES OF AMERICA; ERNEST L. STENSGAR, LAWRENCE ARIPA, MARGARET JOSÉ, DOMNICK CURLEY, AL GARRICK, NORMA PEONE and HENRY SIJOHN, individually, in their official capacity and on behalf of all enrolled members of the COEUR D'ALENE TRIBE OF IDAHO, Plaintiffs, v. STATE OF IDAHO; CECIL D. ANDRUS, GOVERNOR; PETE CENARRUSA, SECRETARY OF STATE; LARRY ECHOHAWK, ATTORNEY GENERAL; J.D. WILLIAMS, AUDITOR; JERRY EVANS, SUPERINTENDENT OF PUBLIC INSTRUCTION; KEITH	CIVIL NO. 91-0437-N-HLR

HIGGINSON, DIRECTOR, DEPT.)
OF WATER RESOURCES; each)
individually and in his official)
capacity; IDAHO STATE BOARD)
OF LAND COMMISSIONERS; and)
IDAHO STATE DEPARTMENT OF)
WATER RESOURCES,)
)
Defendants.)
)
_____)

ORDER GRANTING MOTION TO DISMISS

I. FACTS AND PROCEDURE

This action was filed on October 15, 1991. The Complaint by the Coeur d'Alene Indian Tribe of Idaho and various individual tribe members (hereinafter collectively referred to as the "Tribe") against the State of Idaho and various state officials and agencies, seeks an order from the court quieting title in the Tribe to the beds, banks, and waters of all navigable watercourses within the 1873 boundaries of the Coeur d'Alene Reservation. These watercourses include Lake Coeur d'Alene. The Complaint further seeks a declaratory judgment that these beds, banks, and waters at issue are for the exclusive use, occupancy, and enjoyment of the Tribe. The Complaint also asks the court to declare invalid all Idaho statutes and ordinances which regulate or affect in any way the disputed lands and waters, and to declare invalid the water right set forth in Idaho Code § 67-4304.[1] And,

[1] Idaho Code § 67-4304 (1989) reads, in part, as follows:
The governor is hereby authorized and directed to appropriate in trust for the people of the state of Idaho all the unappropriated water of Priest, Pend d'Oreille and Coeur d'Alene Lakes or so much thereof as may be necessary to preserve said lakes in their present condition. The preservation of said water in said lakes for scenic beauty, health, recreation, transportation and commercial purposes necessary and desirable for all the inhabitants of the state is hereby declared to be a beneficial use of such water.

lastly, the Complaint seeks an injunction enjoining the State and its agencies and officials from taking any action to regulate or in any way affect the Tribe's right to these lands and waters.

Rather than answer the Complaint, the State, and the officials and agencies of the State, filed a Motion to Dismiss on November 13, 1991, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. The motion is brought on the grounds that this action is barred by the jurisdictional limitations imposed on the federal judiciary by the Eleventh Amendment to the United States Constitution. The motion is also made on the grounds that the Complaint fails to state a claim upon which relief may be granted.

The Tribe responded to the Motion to Dismiss on February 21, 1992. The State then filed its reply brief on March 6, 1992. A hearing on this motion was held on Wednesday, June 17, 1992, in Coeur d'Alene, Idaho. This motion is now ripe for decision.

II. ANALYSIS

A. Introduction

The Tribe seeks to have all beds, banks, and waters of all navigable waters within the 1873 borders of the reservation returned to their exclusive occupancy and use. The court is acutely aware of the significant interests at stake for the parties on both sides of this dispute. Consequently, the court has conducted a very careful and thorough analysis of the memoranda filed by the parties and the cases cited therein, and the affidavits, and exhibits submitted in connection with the memoranda, as well as the arguments made by counsel at the hearing. Upon completion of this analysis, the court finds that the State's position is correct. The claims brought by the Tribe are barred by the Eleventh Amendment, and the Tribe has failed to state a claim upon which relief may be granted. Based on the discussion to follow, the Motion to Dismiss will be granted.

B. Motion to Dismiss as Relates to the State of Idaho

The court has reviewed many cases dealing with state immunity under the Eleventh Amendment with respect to suits in federal court by Indian tribes against states. In terms of the motion now at issue, the court finds the recent Supreme Court case of *Blatchford v. Native Village of Noatak*, ___ U.S. ___, 111 S. Ct. 2578 (1991), to be particularly instructive. In this case, the Supreme Court reversed the Ninth Circuit's decision in *Native Village of Noatak v. Hoffman*, 896 F.2d 1157 (9th Cir. 1990).

In *Hoffman*, native village governments, which the Ninth Circuit accepted as falling within the definition of "tribes," sued the State of Alaska, the Alaska Department of Community and Regional Affairs, and the Commissioner of that department. The plaintiffs sought an order directing the state to pay over their pro rata share of revenue sharing monies appropriated by the state legislature. The plaintiffs further sought an injunction prohibiting the Commissioner from diluting the plaintiffs' share of those monies by expanding the class of eligible recipients. The plaintiffs further alleged that the actions of the state, its agencies and officials, violated the constitutional rights of the members of the tribes and villages, in violation of 42 U.S.C. § 1983.

The district court dismissed the case, holding that it lacked subject matter jurisdiction because the plaintiffs' suit was barred by the Eleventh Amendment or because, in the alternative, the case did not arise under the Constitution, laws, or treaties of the United States. *Native Village of Noatak v. Hoffman*, 896 F.2d at 1159-60. The plaintiffs then appealed to the Ninth Circuit.

The Ninth Circuit held that Eleventh Amendment immunity does not apply when a state is sued by an Indian tribe. *Id.* at 1165. The Ninth Circuit also held that although 28 U.S.C. § 1362[2] did not expressly abrogate

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[2] Title 28 U.S.C. § 1362 provides that, "[t]he district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." 28 U.S.C.S. § 1362 (Law. Co-op. 1988).

state immunity from suit by Indian tribes, an express abrogation was unnecessary because of its decision that the Eleventh Amendment does not apply when states are sued by tribes. *Id.* at 1164-65.

In *Blatchford*, the Supreme Court reversed the Ninth Circuit. The Supreme Court held that the Eleventh Amendment[3] bars suits by Indian tribes against states without their consent.

> Despite the narrowness of its terms, since *Hans v. Louisiana*, 134 U.S. 1, 10 S. Ct. 504, 33 L.Ed. 842 (1890), we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty . . . and that a State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the "plan of the convention."

Blatchford v. Native Village of Noatak, 111 S.Ct. at 2581 (citations omitted).

The tribes in *Blatchford* first argued that sovereign immunity only restricts suits by *individuals* against sovereigns, not by *sovereigns* (i.e. Indian tribes) against sovereigns. The Supreme Court noted that this same

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[3] The Eleventh Amendment reads as follows: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against any one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S.C.S. Constitution, Amendment 11 (Law. Co-op. 1984).

argument was rejected in *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934).[4]

The tribes next argued that the states had waived their immunity from suits by Indian tribes when the states adopted the Constitution. This position was adopted by the Ninth Circuit, and led to the appeal to the Supreme Court. The Supreme Court held that:

> Just as in *Monaco* with regard to foreign sovereigns . . . there is no compelling evidence that the Founders thought such a surrender inherent in the constitutional compact. We have hitherto found a surrender of immunity against particular litigants in only two contexts: suits by sister States . . . and suits by the United States.

Blatchford v. Native Village of Noatak, 111 S.Ct. at 2582 (citations and footnote omitted). In making their argument, the tribes asserted that Indian tribes are more like states than foreign sovereigns, and they should therefore be allowed to sue states just as one state may sue another in federal court. The Supreme Court also rejected this assertion.

> The relevant difference between States and foreign sovereigns, however, is not domesticity, but the role of each in the convention within which the surrender of immunity was for the former, but not for the latter, implicit. What makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession. There is no such mutuality with

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[4] In *Monaco*, the Supreme Court held that states are immune from suit in federal court by foreign sovereigns. *Principality of Monaco v. Mississippi*, 292 U.S. at 330.

> either foreign sovereigns or Indian tribes. We have repeatedly held that Indian tribes enjoy immunity from suits by States . . . as it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties. But if the convention could not surrender *the tribes'* immunity for the benefit of the *States*, we do not believe that it surrendered the States' immunity for the benefit of the tribes.

Id. at 2582-83 (citation omitted).

In addition, the Supreme Court held that 28 U.S.C. § 1362 does not abrogate the states' Eleventh Amendment Immunity from suit by Indian tribes. The Court noted the test for congressional abrogation set forth in *Dellmuth v. Muth*, 491 U.S. 223 (1989). The test requires that the intent of Congress to abrogate Eleventh Amendment immunity must be "unmistakenly clear in the language of the statute." *Id.* at 228. The Court ruled that 28 U.S.C. § 1362 did not meet this standard. *Blatchford v. Native Village of Noatak*, 111 S.Ct. at 2586.

The recent *Blatchford* decision clearly enunciates the Supreme Court's fundamental views about a state's Eleventh Amendment immunity from suit by Indian tribes. The Court expressly held that suits by tribes against states are barred by the Eleventh Amendment. The Court also expressly held that suits against states for money damages are barred. In addition, the Supreme Court in a previous decision made it clear that the Eleventh Amendment bars suits against states in *both law and equity*. "And, as when the *State itself* is named as the defendant, a suit against state officials that is in fact a suit against a State is barred *regardless of whether it seeks*

damages or injunctive relief." Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 101-02 (1984) (citation omitted). The Court made this quite clear in *Cory v. White*, 457 U.S. 85 (1982):

> *Edelman* did not hold, however, that the Eleventh Amendment never applies unless a judgment for money payable from the state treasury is sought. It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought. . . . Thus, *the Eleventh Amendment by its terms clearly applies to a suit seeking an injunction, a remedy available only from equity*. To adopt the suggested rule, limiting the strictures of the Eleventh Amendment to a suit for a money judgment, would ignore the explicit language and contradict the very words of the Amendment itself.

Id. at 90-91 (footnote omitted) (emphasis added).

Therefore, based on the preceding analysis, the court finds that this action is completely barred as against the State of Idaho itself, as well as its agencies, by operation of the Eleventh Amendment.

C. Motion to Dismiss as Relates to Individual State Officials

With respect to the individual defendants acting in their official capacity, the court first notes *Pennhurst State School & Hosp. v. Halderman, supra*, in which the Supreme Court declared:

> The Eleventh Amendment bars a suit against state officials when "the state is the real, substantial party in interest." . . . Thus, "[t]he general rule is that relief sought nominally against an officer is in fact against the sovereign *if the decree would operate against the latter.*" . . . And, as when the State itself is named as the defendant, a suit against state officials that is in fact a suit against a State is barred *regardless of whether it seeks damages or injunctive relief.*

Id. 465 U.S. at 101-02 (citations omitted) (emphasis added).

There is an exception to this general rule where a suit challenges the constitutionality of a state official's action in attempting to enforce a statute which is alleged to violate federal law. *See Ex parte Young*, 209 U.S. 123 (1908). Under such circumstances, a federal court may issue an injunction to prohibit a state official from violating federal law. Yet, the Supreme Court itself characterizes this as a *narrow* exception, which has not been expansively interpreted. *See Pennhurst State School & Hosp. v. Halderman*, 465 U.S. at 102. In addition, such an injunction may govern an official's *future* conduct, but may not attempt to award retroactive relief. *Id.* at 102-03.

In *Green v. Mansour*, 474 U.S. 64 (1985), a class action was brought in federal court against the director of the Michigan Department of Social Services, but the State of Michigan was not named as a defendant. The plaintiffs sought a declaratory judgment from the court. The Supreme Court held that declaratory relief is *impermissible* where such relief would

> *have much the same effect as a full-fledged award of damages or restitution by the federal court*, the latter kinds of relief being of course prohibited by the Eleventh Amendment. The teachings of *Huffman, Samuels*, and *Wycoff* are that a declaratory judgment is not available when the result would be a partial "end run" around our decision in *Edelman v. Jordan* . . . .

Green v. Mansour, 474 U.S. at 73 (citation omitted) (emphasis added).

Under the circumstances of the case at hand, the court concludes that the declaratory relief sought by the Tribe *would* have the same effect as an award of damages or restitution by the court, which is not allowed under the Eleventh Amendment. In addition, by also suing the state officials to quiet title, and for declaratory judgment, the Tribe is essentially attempting to execute an "end run" around the rule in *Edelman v. Jordan*, 415 U.S. 651 (1974), which prohibits suits in federal court against state officials for money damages or the equivalent, under the Eleventh Amendment. It should also be noted that in *Edelman*, the Supreme Court stated that " '[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.' " *Id.* at 663-64 (*quoting Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945)).

Thus, based on the preceding analysis, the claims for declaratory judgment and to quiet title against the individual state officials are also barred by the Eleventh Amendment. These causes of action do not fall within the

narrow exception set forth in *Ex parte Young* and its progeny. This conclusion is based on the nature of the relief sought and on the court's finding (set forth below) that because the State has been in rightful possession of the beds, banks, and waters at issue since its admission to the Union, these state officials are not violating any federal law.

The remaining question is whether the prayer for an injunction against the individual defendants prevents the court from granting the Motion to Dismiss. For this prayer to survive, it must meet the criteria first established in *Ex Parte Young*. In order for the court to be able to issue an injunction against the individual defendants, to prevent them from regulating or taking any action contrary to the Tribe's claimed right of exclusive use and possession of the disputed lands and waters, notwithstanding the jurisdictional limitations of the Eleventh Amendment, the Tribe must show that the injunction is necessary to prevent the state officials from continuing to violate rights secured and protected by federal law.

The court could enjoin the individual defendants if it were to find that the State is not the rightful owner of the disputed lands and waters. Yet, the claims asserted by the Tribe are without foundation, and similar claims have often been rejected by federal courts. It has long been recognized that the ownership of land under navigable waters is an incident of sovereignty. *See Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367, 409-411 (1842). It is also well established that the federal government held such lands in trust for future states, to be granted to new states as they entered the Union, so that the new states would

assume sovereignty on an "equal footing" with the established states. *See State of Montana v. United States*, 450 U.S. 544, 551 (1981).

> The equal footing doctrine is deeply rooted in history, and the proper application of the doctrine requires an understanding of its origins. Under English common law the English Crown held sovereign title to all lands underlying navigable waters. Because title to such land was important to the sovereign's ability to control navigation, fishing, and other commercial activity on rivers and lakes, ownership of this land was considered an essential attribute of sovereignty. Title to such land was therefore vested in the sovereign for the benefit of the whole people. . . . When the 13 Colonies became independent from Great Britain, they claimed title to the lands under navigable waters within their boundaries as the sovereign successors to the English Crown. . . . Because all subsequently admitted States enter the Union on an "equal footing" with the original 13 States, they too hold title to the land under navigable waters within their boundaries upon entry into the Union.

Utah Div. of State Lands v. United States, 482 U.S. 193, 195-96 (1987) (citations omitted).

A state's power over the beds of navigable waters is subject only to the right of the federal government to ensure that the waters remain open to interstate commerce. *State of Montana v. United States*, 450 U.S. at 551; *see also United States v. State of Oregon*, 295 U.S. 1, 14 (1935). It is also recognized that prior to the admission of a state into the Union, Congress may have at times conveyed

lands under its navigable waters for certain limited purposes, "[b]ut because control over the property underlying navigable waters is so strongly identified with the sovereign power of government . . . it will not be held that the United States has conveyed such land except because of 'some international duty or public exigency.' " *State of Montana v. United States*, 450 U.S. at 552 (citation omitted).

In *Montana*, the Supreme Court directed that:

> A court deciding a question of title to the bed of a navigable water must, therefore, begin with a *strong presumption against conveyance* by the United States . . . and must *not* infer such a conveyance "unless the intention was definitely declared or otherwise made plain" . . . or was rendered "in clear and especial words" . . . or "unless the claim confirmed in terms embraces the land under the waters of the stream . . . . "

Id. (citations omitted) (emphasis added).

In *United States v. Holt State Bank*, 270 U.S. 49 (1926), the Supreme Court addressed an Indian tribe's claim to the bed of a navigable lake in Minnesota. The lake was completely within the boundaries of the tribe's reservation, which was created by treaties before Minnesota entered the Union.

> In these treaties the United States promised to "set apart and withhold from sale, for the use of" the [Chippewa tribe], a large tract of land, Treaty of Sept. 30, 1854, 10 Stat 1109, and to convey "a sufficient quantity of land for the permanent homes" of the Indians, Treaty of Feb. 22, 1855, 10 Stat 1165. . . . The Court concluded that there was nothing in the treaties "which

> even approaches a grant of rights in lands underlying navigable waters; nor anything evincing a purpose to depart from the established policy . . . of treating such lands as held for the benefit of the future State."

State of Montana v. United States, 450 U.S. at 552-53 (*quoting United States v. Holt State Bank*, 270 U.S. at 58-59).

The Supreme Court reached the same conclusion on different facts in *Montana*. In *Montana*, the Crow Tribe of Montana, by tribal resolution, prohibited hunting and fishing within the borders of their reservation by anyone who was not a member of the tribe. The State of Montana continued to assert its right to regulate hunting and fishing by non-Indians within the reservation. The United States intervened in the suit on its own behalf and as fiduciary for the tribe. The United States sought,

> (1) a declaratory judgment quieting title to the bed of the Big Horn River in the United States as trustee for the Tribe, (2) a declaratory judgment establishing that the Tribe and the United States have sole authority to regulate hunting and fishing within the reservation, and (3) an injunction requiring Montana to secure the permission of the Tribe before issuing hunting or fishing licenses for use within the reservation.

State of Montana v. United States, 450 U.S. at 549.

The district court denied all claims. In doing so, the district court relied on the presumption that the federal government did not intend to convey title to navigable waters and the lands beneath them. In applying that presumption to the facts of that case, the district court concluded that the language of the treaties and other

factual circumstances were insufficient to overcome the presumption. *Id.*

The Ninth Circuit reversed the district court on the grounds that the 1868 treaty caused the beds and banks of the river to be held by the United States in trust for the tribe. The Supreme Court then reversed the Ninth Circuit decision. The Supreme Court first noted that the treaty of 1868 described the reservation land in detail:

> "[C]ommencing where the 107th degree of longitude west of Greenwich crosses the south boundary of Montana Territory; thence north along said 107th meridian to the mid-channel of the Yellowstone River; thence up said mid-channel of the Yellowstone to the point where it crosses the said southern boundary of Montana, being the 45th degree of north latitude; and thence east along said parallel of latitude to the place of beginning. . . . " Second Treaty of Fort Laramie, May 7, 1868, Art II, 15 Stat 650.

Id. at 553, n.4. The treaty further specified that the reservation land was set aside for the absolute and undisturbed use and occupation of the tribe. *Id.* at 553.

Although the treaties which created the Crow reservation described the reservation land in detail, including a boundary which extended to the middle of the channel of a section of the Yellowstone River, the Supreme Court in *Montana* held that all the treaties did was reserve the designated land in a general way to ensure the continued occupation of the Indians in what remained of their ancestral territory. *Id.* at 554. Thus, the Supreme Court

concluded that the treaties of 1851 and 1868 which created the Crow reservation did not have language sufficient to overcome the strong presumption against conveyance of the beds and banks of navigable waters within the reservation.

> The mere fact that the bed of a navigable water lies within the boundaries described in the treaty does not make the riverbed part of the conveyed land, especially when there is no express reference to the riverbed that might overcome the presumption against its conveyance . . . . [T]he United States retains a navigational easement in the navigable waters lying within the described boundaries for the benefit of the public, regardless of who owns the riverbed. Therefore, such phrases . . . as "absolute and undisturbed use and occupation" and "no persons[ ] except those herein designated . . . shall ever be permitted," whatever they seem to mean literally, do not give the Indians the exclusive right to occupy all the territory within the described boundaries. . . .
>
> . . . .
>
> For these reasons, we conclude that title to the bed of the Big Horn River passed to the State of Montana upon its admission into the Union . . . .

Id. at 554-56 (citations omitted).

In the case at hand, the Tribe claims that because the Executive Order executed on November 8, 1873, described part of the boundary of the reservation as extending to the center of the channel of the Spokane River, the Tribe is therefore entitled to exclusive possession and use of all the lands underneath, as well as the

banks and beds of *all* navigable waters within the boundaries of the reservation. This assertion is indefensible and is contrary both to the clear holding in *Montana*, and the *strong presumption* in favor of these lands being conveyed to the State of Idaho upon its entry into the Union.

The 1873 executive agreement with the Coeur d'Alene Tribe and the formal agreement ratified in 1891 had many similarities to the 1868 treaty with the Crow tribe at issue in the *Montana* case: (1) the agreements with the Coeur d'Alene Tribe also described the reservation lands in detail; (2) one boundary of the reservation was set in the middle of a river (the Spokane River); (3) the reservation lands were set aside in a general way, to be held forever as Indian lands, never to be sold, opened to white settlement, or otherwise disposed of without the consent of the Tribe; and (4) there was no express conveyance or other reference to the beds or banks of navigable waters which would overcome the strong presumption against such conveyance.

The court is bound to interpret the 1873 agreement and the formal agreement ratified in 1891, which extended one boundary of the reservation to the center of a portion of the Spokane River, the same way that the Supreme Court interpreted the treaty with the Crow tribe in the *Montana* case, which had similar provisions. Therefore, because the agreements with the Coeur d'Alene Tribe made no express conveyance of the beds and banks of navigable waters within the reservation, or any other references which could be construed as having done so, the court finds that there is nothing in the agreements which overcomes the strong presumption that these lands were held in trust by the United States and conveyed to

the State of Idaho upon its admission to the Union on an "equal footing" with the other states.[5]

Therefore, the court finds that the State of Idaho has been in rightful possession of all of the lands and waters at issue in this case since it entered the Union in 1890. Consequently, the Tribe is not entitled to an injunction against the individual defendants in either their official or individual capacities.

D. Title 42 U.S.C. § 1983 Claim

Based on the reasons stated above, the plaintiffs' Title 42 U.S.C. § 1983[6] claim also fails. First, the Section 1983

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[5] The Tribe's claim to the banks and beds of the navigable waters within the reservation is based almost exclusively on the fact that one portion of the original reservation boundary extended to the middle of the Spokane River. As noted above, the court finds that this claim is contrary to long-established and well-recognized law. In addition, the court notes that this claim is especially weak because an area of the reservation, including this section of the Spokane River, was ceded by the Tribe to the United States by an agreement executed in 1889.

The court further notes that the agreements with the Tribe were not formally ratified by Congress until March 3, 1891, eight months *after* Idaho was admitted to the Union. It is well established that Congress cannot convey a state's submerged lands to other parties after statehood. *See Shively v. Bowlby*, 152 U.S. 1, 27 (1894).

[6] Section 1983 provides as follows:

> Every *person* who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory or the District of Columbia, subjects, or causes to be subjected, any *citizen* of the United States or other *person* within the jurisdiction thereof to the

action against the State of Idaho is barred by the Eleventh Amendment. In *Quern v. Jordan*, 440 U.S. 332 (1979), the Supreme Court held that Section 1983 did not override the sovereign immunity guaranteed to the states by the Eleventh Amendment. *Id.* at 342-43. This decision was reaffirmed in *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989), where the Court declared:

> Section 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties. The Eleventh Amendment bars such suits unless the State has waived its immunity . . . or unless Congress has exercised its undoubted power under § 5 of the Fourteenth Amendment to override that immunity. That Congress, in passing § 1983, had no intention to disturb the States' Eleventh Amendment immunity and so to alter the federal-state balance in that respect was made clear in our decision in *Quern*.

Id. at 66.

Second, the court finds that the Tribe may not bring a Section 1983 action because it is not a "citizen of the United States or other person" for purposes of Section 1983. Therefore, the remaining issue is whether the Section 1983 claim brought by the individual plaintiffs

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> deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983 (Law. Co-op. 1990).

against the state officials can survive the Motion to Dismiss.

The court has determined that the State of Idaho is and always has been in rightful possession of the beds, banks, and waters of all of the navigable watercourses at issue in this case. Because of this conclusion, the Section 1983 claim against the individual defendants, both in their official and individual capacity, is barred because the plaintiffs are not being deprived of any rights, privileges, or immunities secured by the Constitution and laws of the United States.

Thus, for the foregoing reasons, the court concludes that this entire action should be dismissed.

III. ORDER

Based on the foregoing, and the court being fully advised in the premises,

IT IS HEREBY ORDERED that the Motion to Dismiss filed on November 13, 1991, should be, and is hereby, GRANTED. All claims brought by the plaintiffs in this action are hereby DISMISSED.

DATED this 20th day of July, 1992.

/s/ Harold L. Ryan
HAROLD L. RYAN
UNITED STATES
DISTRICT JUDGE